BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WENDELL D. COLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 201,133
HALLIBURTON COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals from the November 18, 1997, Award of Assistant Director Brad E. Avery. The Appeals Board heard oral argument on May 27, 1998.

APPEARANCES

Claimant appeared by and through his attorney, Peter G. Olson of Liberal, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Stephen J. Jones of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the 17 percent permanent partial whole body functional impairment has been stipulated to by the parties. At oral argument before the Appeals Board, claimant withdrew his objection to the second Murati deposition taken by respondent on July 18, 1997. Therefore, both Murati depositions will be considered as part of the record.

ISSUES

Respondent raises the following issues for Appeals Board consideration:

"(1) The Award entered by Assistant Director Brad E. Avery dated November 18, 1997, is excessive.

"(2) The Respondent appeals specifically the issue of claimant's nature and extent of disability."

Both issues deal with the nature and extent of claimant's disability. This is the only issue raised for Appeals Board consideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

The parties have stipulated that claimant met with personal injury by accident arising out of and in the course of his employment with respondent on December 31, 1994, resulting in a 17 percent whole body functional impairment. The only issue to be considered by the Appeals Board is whether claimant is entitled to a work disability under K.S.A. 44-510e(a) which states in pertinent part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

In considering the requirements of K.S.A. 44-510e(a), the Appeals Board will first look to the claimant's loss of ability to perform work tasks. The record contains only one medical opinion, that being Dr. Pedro Murati, regarding claimant's loss of ability to perform work tasks. However, Dr. Murati's deposition was taken twice. In both depositions, he was asked detailed questions about claimant's loss of ability to perform tasks. In reviewing the task lists provided to Dr. Murati, it is noted that, while the task lists are substantially the same, the breakdown of jobs into the separate individual tasks is done differently in both depositions. The task list used by the Assistant Director is found in Murati Exhibit A which is the task list from the July 18, 1997, deposition. The Assistant Director found that Dr. Murati had established that claimant had lost the ability to perform 46 of 83 tasks resulting in a 55 percent loss of task performing ability. The Appeals Board, in considering

the evidence, agrees with the determination by the Assistant Director and adopts the finding of a 55 percent loss of task performing abilities.

Next, the statute obligates the finder of facts to consider the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Several issues must be determined before this computation can be completed. The Assistant Director, in considering the evidence, found that claimant had made a good faith effort to obtain employment following his termination of employment. This determination was made as a result of the Court of Appeals mandate in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals, in harmonizing the language of K.S.A. 44-510e(a) with the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), found that the finder of facts must make a finding of whether claimant has made a good faith effort to find appropriate employment. If a finding is made that a good faith effort has not been made to find appropriate employment, then the fact-finder is obligated to determine an appropriate post-injury wage based upon all the evidence in the record, including any expert testimony concerning the claimant's capacity to earn wages.

A significant dispute exists regarding claimant's post-injury job search. The only contact made by claimant was with Job Service. Job Service advised claimant that there were only two jobs they had available at that time, one in a restaurant and the other as a clerk at a convenience store. Claimant never attempted the convenience store job and only worked in the restaurant, namely, Sonic Drive-In, for one day. He alleged his hands cramped and he couldn't sleep after the single 8-hour shift. He has not attempted to obtain other employment since.

Claimant entered into a training program at Seward County Community College and, at the time of regular hearing, it was anticipated he would graduate in December 1997.

While the Appeals Board commends claimant on his attempt to better himself with this educational program, claimant's single attempt at post-injury employment does not constitute a good faith effort to obtain employment following his termination. Claimant admitted that he was not looking for employment while attending school because it would require him to be in school longer if he were to work. Claimant also acknowledged that he was physically capable of performing work as a night watchman or a motel clerk but elected not to seek these employment opportunities in order to keep up with his studies.

The Appeals Board finds, pursuant to Copeland, that claimant has not made a good faith effort to obtain post-injury employment and a determination will be made regarding an appropriate post-injury wage to be used in the computation of claimant’s work disability as required by K.S.A. 44-510e. But, in reviewing the evidence in the record, the Appeals Board finds no evidence from either claimant or respondent in this regard. The Appeals

Board in this instance, however, considers minimum wage, $5.15 per hour, to be an appropriate standard of claimant's potential earning capacity. In addition, there is no evidence in the record to indicate claimant has been limited to working less than 40 hours per week. Therefore, the Appeals Board imputes a wage of $206.00 per week based upon an hourly rate of $5.15 per hour. This, when compared to claimant's average weekly wage of $640.35, equates to a 68 percent loss of wage earning ability. In averaging claimant's task loss with claimant's loss of wage earning ability, the Appeals Board finds claimant has suffered a work disability of 61.5 percent.

In all other regards, the Award of the Assistant Director is affirmed insofar as it does not conflict with the findings contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an Award is granted in favor of the claimant, Wendell D. Cole, and against the respondent, Halliburton Company, a self-insured, for an injury occurring on December 31, 1994, for a 61.5 percent permanent partial disability to the body as a whole.

Claimant is entitled to 70 weeks of temporary total disability compensation at the rate of $313 per week in the amount of $21,910.00, followed by 221.4 weeks of permanent partial disability compensation at the rate of $313 per week in the amount of $69,298.20, for a total award of $91,208.20.

As of June 2, 1998, claimant would be entitled to 70 weeks of temporary total disability compensation at the rate of $313 per week totaling $21,910.00, followed by 108.43 weeks of permanent partial disability compensation at the rate of $313 per week totaling $33,938.59, making a total due and owing of $55,848.59, which is ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 112.97 weeks of permanent partial disability compensation at the rate of $313 per week totaling $35,359.61 until fully paid or until further order of the Director.

Claimant's contract of employment with his attorney is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Underwood & Shane
Transcript of Regular Hearing $242.50

CRS Court Reporting Service

Deposition of Pedro Murati, M.D.	$118.40
Barber & Associates	
Deposition of Karen Terrill	$181.20
Deposition of Pedro Murati, M.D.	$233.80

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Peter G. Olson, Liberal, KS
Stephen J. Jones, Wichita, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director